Our people, in upholding, and, in case of need, defending with their fortunes and their lives, the union of the States, act on the plainest principles of common sense. We know that in securing "the greatest happiness of the greatest number" we incur great dangers, not the least of which grows out of the very exuberant prosperity we enjoy. We are quite aware, also, that we must forego much that tends to refine and embellish society in some other parts of the world. The splendors of royalty, the gorgeous vestments and imposing ceremonies of a national church, the massive cathedrals which add so much to the landscape, and fill with a solemn pleasure those who enter them, are not for us. Enough if we can be spared the squalid poverty, the gross ignorance, and the debasing servility which too often present a painful set-off to these advantages.

ART. II. — 1. *Revised United States Army Regulations of* 1861, *with an Appendix, containing the Changes and Laws affecting Army Regulations and Articles of War to June* 25, 1863. Washington: Government Printing Office. 1863.

2. *Digest of Opinions of the Judge Advocate-General of the Army.* Washington: Government Printing Office. 1865.

3. *Instructions for the Government of the Armies of the United States.* Prepared by FRANCIS LIEBER, LL. D., and revised by a Board of Officers of which MAJOR-GENERAL HANCOCK is President. Washington: Government Printing Office. 1863.

4. *The Duties of Judge Advocates. Compiled from Her Majesty's and the Hon. East India Company's Military Regulations, and from the Works of various Writers on Military Law.* By CAPTAIN R. M. HUGHES, 12th Regiment Bombay Army, Deputy Judge-Advocate-General, Scinde Field Force. London: Smith, Elder, & Co. 1865.

5. *A Treatise on Military Law and the Practice of Courts Martial.* By CAPTAIN S. V. BÈNET, Ordnance Department U. S. Army, late Assistant Professor of Ethics, Law, etc., Military Academy, West Point. New York: Van Nostrand & Co. 1862.

6. *Observations on Military Law, and the Constitution and Practice of Courts Martial. With a Summary of the Law of Evidence as applicable to Military Trials, adapted to the Laws, Regulations, and Customs of the Army and Navy of the United States.* By WILLIAM DE HART, Captain 2d Regiment Artillery. New York: D. Appleton & Co. 1862.

WHO, ten years ago, would have believed that within the subsequent decade one half the territory of the United States, the land of civil liberty, would be subject to military and martial law for a period of over four years, — that, in the vast expanse of country stretching from the Potomac, Ohio, and Missouri to the Gulf of Mexico, no other system of law would be recognized by the supreme power of the land, — and that not merely over the inhabitants of the territory so bounded would military law hold its sway, but over more than a million of our Northern citizens, educated under the milder rules of civil justice, and utterly unused to the laws and decrees of her more peremptory sister? Yet with so ready an obedience did this great mass of civilians suddenly become soldiers, and submit to every obligation of this new law, that one could hardly believe they had not sucked in its principles in the cradle, or studied them on the benches of the town school. A million of the greatest democrats in the world suddenly submitted to a despotism.

This was in fact a great step in self-government. For the necessary despotism of military rule implies the entire and unconditional obedience and subordination of the inferior to the superior. And this obedience was willingly rendered, not merely because of the ready wit of our people, and their adaptability to any and all circumstances, but because our soldiers felt that they were still the people, — that they were fighting no despot's war of self-aggrandizement or aggression, but that they, the people, were fighting a people's war; and thus, while each man did not, like Harry Smith in the fray of the Clan Quhele and Clan Chattan, fight "for his own hand," yet each man did fight for himself, insomuch as he felt the people to be the rulers of the country, and himself, as one of these rulers, to be fighting a people's war for himself and all the rest. And thus, because of the very democratic feeling within him, the American sol-

dier submitted to the absolute military discipline by which alone the end so dear to him could be secured.

Our country came suddenly upon this new system of law. We found ourselves, with almost no preparation, in a condition hitherto unexpected and unprovided for. Military and martial law we had read of, but were little experienced in, and we were forced suddenly upon their immediate exercise on a gigantic scale. We took the old laws, forms, and regulations provided for our little regular army, by which it had been governed through so long a time of peace, and applied them as well as we could to the great army of the present time, and to the great questions constantly arising under the laws of war. We had not merely a war on our hands, but our enemies were also our fellow-citizens. The war was also a rebellion. Difficult questions became more embarrassed by this double relation. Much was left to the genius of our generals, governed in leading principles by the ruling power at Washington. There was more to be obtained from practical experimentalizing than from ancient theories and old practice. We had not merely to apply old principles, but to make new ones; and all this with a vast danger constantly pressing upon us, and the safety of the republic the supreme law of all.

Martial and military law are often confounded, while in reality distinct. Military law is a portion of the law of the land, by which the army is governed as a distinct organization. It has its own distinct laws and rules. Martial law, on the other hand, is that system of law which is enforced by a conquering army in territory of the enemy occupied by it, and in place of civil, or is declared by the sovereign power of the state in time of rebellion. Military law exists by force of statute; martial law, by the custom of war alone. Military law exists both in peace and war; martial law, in time of war or rebellion only. Military law, strictly speaking, applies only to the army and those connected with it; martial law, to whole states and peoples. Military law relates only to the administration of criminal justice; martial law, in addition, affects the civil rights and status of entire populations. While one exists naturally and normally as the necessary system by which a peculiar class of men are governed, by a method peculiar to that class, and suit-

ed to it as distinguished from the rest of society, the other is brought about by an abnormal condition of affairs, namely, the necessity of law and order in a conquered territory, in which the ordinary civil tribunals are temporarily suspended, either through the abandonment of their posts by the civil magistrates, or their refusal to exercise their functions; or, in case of rebellion, by the insufficiency of the civil power to insure the public safety.

The rules of military law are fixed and definite, while those of martial law vary with time and place, and depend upon the exigencies of the situation, the nature of the population, their disposition towards the conquering army, and, in rebellion, upon the imminence of the danger. Indeed it was said by the Duke of Wellington that martial law is "no law at all," being merely the will of the general commanding the army. "Martial law," says Judge-Advocate-General Holt, "is defined to be the will of the general who commands the army, and its proclamation by the President necessarily invests a general commanding in a district where it is declared that it shall prevail with plenary power. While its declaration could not properly be referred to as authorizing acts of excess or wanton wrong, it would at the same time justify the military commander in summary and stringent measures, which, in the absence of martial law, might be deemed extraordinary and oppressive."* It would seem that the definition of the "will of the commanding general" was at least a defective one, and the limitations stated by Judge Holt go to prove this. Law is a rule of action; and certainly, if the will of the commanding general is to be its own criterion, we may agree with the Duke of Wellington, and declare the whole term a misnomer, and that martial law is no law at all. If the only ruling, judging, and executing power is the will of the commanding general, what is there to prevent the most tyrannous and absurd oppression from being exercised in any country occupied by an invading army? A correct definition would certainly seem to require this addition, — that it is "the will of the commanding general, exercised in accordance with the laws of war and the usages of

* Digest of Opinions of the Judge-Advocate-General, p. 75.

civilized warfare." Martial law is probably the most indefinite of laws; but it has at least certain general rules and limits, and is not, like the despotism of Eastern tyrannies, without appeal from the bowstring or the scymitar.

The presence of a hostile army in an enemy's territory carries with it, *per se*, martial law without proclamation,* while it may be proclaimed by the supreme power of a state over any portion of the territory of that state which has, either by invasion or insurrection, become the theatre of hostilities, or in which the civil authority is not sufficient to preserve public safety. From the former source came the existence of martial law in the seceded States as fast as occupied by our forces; from the latter, martial law in Kentucky.

The United States Supreme Court having decided† that our recent war is to be justly considered a territorial war, (as one of the attributes of a perfect war as distinguished from a mere insurrection,) and the enemy's country to be bounded by certain limits, in the same manner as in a foreign war, and that our belligerent right is in no wise opposed to our sovereign right, but consistent with it, it follows that the gradual occupation of the rebellious States by our army drew with it the same consequences, *quoad* martial law, as if we had been invading and occupying a foreign country. The advance of the army carried martial law with it, abolished without further notice civil courts and police regulations hostile to it, and will continue to exist until such time as the national government shall declare it abolished.

Martial law is administered by the commanding general, and its violations are punished by means of military commissions and provost courts. The orders of the commanding general lay down the general rules to be followed in his department. They define the general regulations and laws to be observed by citizens within it. They must vary in degree of severity with the disposition of the people, the proximity to the enemy, and many other circumstances. He acts in these matters under the instructions of his government. The general resembles not a little the proprætor in the Roman provinces.

* Instructions for the Government of the Armies of the United States, p. 1.

† Case of Brig Amy Warwick, 2 Black's Rep., p. 635.

Military commissions, consisting of not less than three commissioned officers, are appointed for the administration of criminal justice. Like martial law, of which they are the offspring, military commissions derive their existence from necessity. When the ordinary tribunals of the occupied or insurrectionary country can safely be permitted to sit, military commissions are unnecessary and oppressive. But where their inefficiency, disloyalty, or hostility incapacitates the civil tribunals from sitting, or if they fail to perform their functions properly, then, from the necessities of the case, military courts must take their place. There clearly must be some method of preserving law and order, and of punishing men who offend against the rules of right common to all societies and essential to their existence. In countries occupied by military force, the citizens, having lost their customary tribunals by reason of the victorious army, have a claim to be protected in their lives and property, and to call upon the supreme power for the time being — that is, the commanding general — for this protection and the punishment of offenders. Citizens must be protected against the soldiers, the soldiers against the citizens. In insurrectionary districts and countries placed under martial law because of rebellion, military justice becomes the powerful and dangerous, but only saving medicine.

A military commission is governed by the same rules and forms as a court martial, and exhibits the same defects in those forms which we shall hereafter point out in a court martial. It differs only in jurisdiction, and in requiring but three members for a quorum, instead of five. Its proceedings are submitted to the revision of superior authority, and are subject to approval or disapproval. As a general court martial is a creature of the statute law, and is competent to try those persons and cases only of which jurisdiction is given it by statute, and as, where regular civil tribunals capable of exercising their functions exist, a soldier guilty of an offence within the statute, and not of a military nature, is properly to be turned over to the civil tribunal for trial, it follows that military commissions taking their place have jurisdiction over soldiers in many cases; as, for example, in counterfeiting money, perjury, etc.

In the war through which we have just passed, during which

our nation and our soldiers have been so constantly attacked by enemies not arrayed in the garb of the soldier nor opposing us in open warfare, but by stealth and treachery, the use and necessity of military commissions have been particularly exemplified in their jurisdiction over the offences of *treachery* against the Republic or its citizens, as distinguished from the offences of those who waged open warfare, and whom we were compelled to regard as belligerents. This jurisdiction proceeds clearly from the war power and the right of self-protection incident to every nation. It is held not to be inconsistent with the amendment to the Constitution, giving the right of trial by jury to any person held to answer for capital or otherwise infamous crimes, except in cases arising in the land or naval forces. It is claimed that, in construing the Constitution, all the parts must be taken together, and that it provides for the efficient exercise of the war power. It is argued that the 57th Article of War, forbidding correspondence with or giving intelligence to the enemy, has, from a very early period, rendered amenable to trial by court martial civil as well as military persons.* The 56th Article of War, also, providing in general language that "*whosoever* shall relieve the enemy with money, victuals, or ammunition, or knowingly harbor or protect an enemy," received in the trial of Congressman Harris the same construction. By means of these tribunals, guerillas, blockade-runners, persons trading with the enemy, those violating their oath of allegiance, assassins, poisoners, spies, bushwhackers, and other criminals by stealth and in disguise, as distinguished from those who met us in the field in gray, were brought to summary and just punishment. "Many offences," said Major-General Halleck, in taking command of the Department of Missouri,† "which in time of peace are civil offences, become in time of war military offences, and are to be tried by a military tribunal, even in places where civil tribunals exist." This principle has been adopted and followed by our government in a great number of cases. Thus, kidnapping a contraband employed in the Quartermaster's Department of the army in the field, in Kentucky,‡ cutting off the ears of two

* Digest of Opinions of the Judge-Advocate-General, pp. 79, 80.

† General Order No. 1, Head-quarters Department of Missouri, Jan. 1, 1862.

‡ Digest of Opinions of the Judge-Advocate-General, p. 77.

negroes in the same State to prevent their enlisting,* forging soldiers' discharge papers in the District of Columbia,† and smuggling liquors into Alexandria by bribing a soldier, have been held to be offences triable by military commission.‡

Admitting the right of the government, as incident to the condition of war, to extend in this manner the jurisdiction of military commissions, it is obvious that such a right should be exercised with great discretion, and only in cases of necessity. To bring a civilian in a loyal State before such a commission, the ground of action should be extremely cogent. To try by military commission, in the city of New York, an inspector of harness not in any way in the military service, for neglect of duty in receiving defective harness,‖ or a collector of votes for making fraudulent returns of the votes of New York soldiers, or to try in Ohio a citizen of that State for using disloyal language,§ seems to extend the principle beyond all use or necessity. Though, in a struggle for existence such as that through which we have just passed, the errors of the Administration through over-zeal are not to be severely animadverted upon, yet the extreme extension of the jurisdiction of military commissions is not a matter of which we can be proud, or can put forward as a precedent in the law of nations.

The exercise of martial law in this country has met with many opponents; and indeed it would be strange if in this, the land of freedom, above all others, settled by the men who aided in successfully opposing the assaults of martial law under the Stuarts, and now ruled by those accustomed from infancy to the exercise of the amplest liberty, any encroachment upon the rights of the citizen under the common law were not watched with extreme suspicion and jealousy. It would be matter of discredit and disappointment if this were not so. It is only what should be rightly expected from our people. Thus, during the late war, the people were justly sensitive to the dangers arising from too indiscriminate or arbitrary application of mar-

* Digest of Opinions of the Judge-Advocate-General, p. 79.

† Ibid., p. 77. ‡ Ibid., p. 79.

‖ This was before the statute of July 4, 1864, rendering such persons triable by military courts.

§ Digest of Opinions of the Judge-Advocate-General, pp. 77–79.

tial law; and many feared lest the government, in its anxiety for the punishment of traitors, was infringing upon the principles of justice, and imperilling the most precious of popular rights.

Martial law was the ancient fulcrum of oppression. We should not have been ourselves, had we been indifferent in this matter. It was not questioned that such a law as martial law was fully recognized by the law of nations, and was applicable to this country under certain circumstances. This, indeed, was too well established for denial, and is declared by a writer as strongly devoted to constitutional rights as Hallam,* and by all authorities. But it was said that it was improperly exercised and extended. It would not be within the limits of these pages to argue a subject only to be decided from the discussion of a vast number of facts, many of them, moreover, still in dispute. This will be pre-eminently a question for the future historian to decide. Contemporaneous history necessarily errs in justice, even with the best intentions. Many years must elapse before the history of these times can be justly written. It will be for the future historian to say whether, with the vast treachery, of which the limits are yet unknown, to surmount, — with traitors not only without, but in its secret councils, — with an enemy as wily as strong, and resorting to means of warfare unrecognized and almost unknown in the civilized world, so cruel and inhuman that the mind shudders even at the imagination of them, — with the gradual and continuous military occupation of a territory filled with a population animated towards our army and their own loyal neighbors, not merely with the ordinary feelings of an enemy, but with the hate of section and the bitterness of brothers divided, — with

* This principle is so well stated by Hallam that we quote his words: —

"There may indeed be times of pressing danger, when the conservation of all demands the sacrifice of the legal rights of a few; there may be circumstances that not only justify, but compel, the temporary abandonment of constitutional forms. It has been usual for all governments, during an actual rebellion, to proclaim martial law, or the suspension of civil jurisdiction. And this anomaly, I must admit, is very far from being less indispensable at such unhappy seasons in countries where the ordinary mode of trial is by jury, than where the right of decision resides in the judge. But it is of high importance to watch with extreme jealousy the disposition, towards which most governments are prone, to introduce too soon, to extend too far, to retain too long, so perilous a remedy." — *Constitutional History of England,* Vol. I. Chap. V.

the abandonment and destruction of all civil courts and means of obtaining justice in this territory, — with provinces to govern infested by a banditti who feared neither God nor man, whose hands were red with the blood of women and children, — whether, with all these things to look upon, and with the imperative duty of preserving the Republic, our Administration was not justified in its resort to martial law; and whether, in the exercise of a fair discretion, and with such judgment as human nature is capable of, — not, of course, faultless or without errors, — it has not, by summoning to its aid the swift and stern minister of war, added strength to itself and discomfiture to its enemies, without serious injury to the loyal citizen, or the establishment of precedents injurious to the cause of civil liberty. We cannot but express our conviction that history will hereafter record her general approval of the course of the government, and will wonder that in times of such danger and violence so little was yielded to the soldier and so little lost to civil liberty.

When, indeed, the proper time is come, we should lay aside the military commission, as we hang up the sword, not as an instrument of oppression done away, but as a useful weapon for its time and place.

The provost court is another tribunal for the enforcement of martial law, which deserves mention, although the ordinary works on military law, are silent as to its origin, character, or even existence.* In all our military departments the provost-

* We derive both the word and the court itself from the French. *Provost* is from the French *prêvot*, derived from the Latin *præponere*, "to place over," and is primarily a chief or superintendent. Hence the title of provost of a college. In Scotland, the provost is the head of a royal burgh, corresponding to the mayor in other cities. The French *prêvot* was both judge and sheriff, uniting in one our provost judge and provost marshal. His office had its origin in that of the Roman *latrunculator*, who was sent by the Emperor to try and to sentence, as well as to arrest, the *latrones* or *latrunculi*. These men were so called in opposition to the *justi hostes*, or legal enemies. They precisely corresponded to the modern guerillas or bushwhackers, and it may be suspected that the double duties of the Roman *latrunculator* have been repeated many a time in our army, where short shrift for the gallows has been meted out to the Missouri *latrones* caught red-handed. The French *prêvot* was assisted in his judicial duties by civilians, who sat with him on the bench. His court was called the *Cour Prevôtale*, and had jurisdiction of escaped convicts, deserters, highway robbers, and other disturbers of the public peace, but resembles little, except in name, the provost

marshal is a well-known officer, but provost courts have been constituted, as far as we are aware, in but two instances, — by Major-General Butler in New Orleans, in May, 1862,* and by Major-General Dix in Norfolk, in June of the same year.

"The provost court is a tribunal," says Judge Holt, "whose jurisdiction is derived from the customs of the service, and which is quite unknown to our legislation. A general commanding a department in which ordinary criminal courts are suspended, is authorized, under circumstances requiring the prompt administration of justice, to appoint a provost judge for the trial of minor offences." †

General Dix, in his order establishing the court, declares: —

"The provost judge shall hear and try all cases civil and criminal (not military) which may come before him, and determine and decide the same, as far as may be conformably with the established laws of the United States applicable thereto; and when such laws are not applicable, or are not sufficient for the ends of justice, according to his best judgment and understanding, and the principles of equity and good conscience; subject in all cases to appeal from his decision to the major-general commanding the corps." ‡

The rules of practice and objects of the courts in New Orleans and Norfolk were substantially the same. In both it was intended that the loyal citizen should, in spite of the abolition of civil courts by the disloyal, be protected in his rights of person and property, that the peace of the cities should be maintained, whether violated by citizens or soldiers, and that the negro, lately born to new rights, should have a just and equitable protection, and a tribunal to which to appeal for redress. No party plaintiff in a civil suit was heard unless he had taken the oath of allegiance; but, for the common example, both loyal and disloyal were protected from criminal assaults upon their persons and property. The lengthy procedure of a military commission was not sufficient for the speedy administration of justice in the hundred cases, both criminal and civil, weekly arising in a large city. An active and intelligent provost judge

courts established during this war. See Beranger, *Justice Criminelle en France*, p. 106 *et seq.*

* General Orders, Head-quarters of the Gulf, No. 16, May 2, 1862.

† Digest of Opinions of the Judge-Advocate-General, p. 103.

‡ General Order No. 6, Head-quarters Seventh Corps, June 27, 1862.

could dispose of them in a tenth part of the time. Injustice or oppression on his part could be remedied by an appeal to the commanding general. Capital and serious cases were reserved for a military commission. Thus the provost court was an advantage not so much to the army as to civilians, and especially to the loyal and peaceable inhabitants.

It was held, however, at the Bureau of Military Justice, that neither a military commission nor a provost court can have jurisdiction of civil suits.* It is difficult to see, in principle, why the violent suppression of civil courts by the disloyal should in time of war and rebellion entirely prevent the loyal from recovering their just dues, especially when their debtors are these very disloyal men; why, under the same military government, there should be protection against a fellow who picks another's pocket, but none against the man who defrauds another by refusing to pay him goods or money justly owed; why, in short, the establishment of a sound state of society is not as much promoted by the suppression of fraud as of violence. It would seem that these military courts, being simply the creatures of necessity, should, in the absence of past precedents to the contrary, and at a time when so many new precedents were created, have been instructed to attend to civil as well as to criminal matters. Indeed, the practical operation of provost courts, prior to this decision, at New Orleans and Norfolk, and of military commissions elsewhere, have demonstrated their usefulness in this particular.

Leaving this branch of our subject, we come now to the consideration of the administration of military law proper. The oath taken by the members of a general court martial requires of them that they will "duly administer justice according to the provisions of an act establishing rules and articles for the government of the armies of the United States, without partiality, favor, or affection, and, if any doubt should arise not explained by said articles, according to their conscience, the best of their understanding, and the custom of war in like cases." † The act referred to is the one containing the Articles of War. By this and by its modifications by subsequent legislation the

* Digest of Opinions of the Judge-Advocate-General, p. 78.

† 69th Article of War, Army Regulations, p. 496.

soldier is governed. The "customs of war in like cases" have not been of great assistance to our newly formed volunteer army, so that they have been left to depend chiefly upon this act. The Articles of War are modelled from the Mutiny and Desertion Acts of England, which were first passed after the accession of William and Mary, for the period of a year, and have since been regularly re-enacted by the British Parliament. They were reported to the Congress of the Confederation, in 1776, three months after the Declaration of Independence, by a committee of which Jefferson and Adams were members, and they were adopted by the Congress of the United States in 1806. In these Articles military crimes are defined, and their punishments declared. The capital offences are mutiny, disobedience, violence to superiors, desertion, advising or persuading desertion, sleeping on post, occasioning false alarms, doing violence to persons bringing provisions to camp, misbehavior before the enemy, making known the watchword, and relieving, harboring, corresponding with, or giving intelligence to the enemy. For these offences alone can death be imposed. Death, however, is not the only penalty for these, but death or such other punishment as shall be ordered by the sentence. For forging a safeguard or lurking as a spy death is the only penalty. An officer found guilty of "drunkenness on duty," of false muster, and certain other fraudulent practices, must receive the sentence of cashiering. An officer guilty of "conduct unbecoming an officer and a gentleman" must be dismissed.* Dismission and cashiering are now practically identical. With these and perhaps a few other exceptions, the punishment is left to the discretion of the court, except that in the case of certain non military offences, of which jurisdiction has been lately given to court martials, such as murder, arson, &c., when committed by a soldier, the punishment cannot be less than that inflicted by the laws of the State or Territory in which the offence is committed.† The ordinary punishments of less degree than the extreme ones are reprimand, and suspension from rank and pay, for an officer; hard labor, ball and chain, solitary confinement, and stoppage of pay, for an enlisted man.

* 83d Article of War.

† Act of March 3, 1863, sect. 30.

A court martial is a court of special jurisdiction conferred by statute. It has no jurisdiction by unwritten law, after the analogy of our common-law courts. Where an offence cannot be brought under some statute, it cannot be tried by court martial. So, conversely, a person subject to the Rules and Articles of War cannot be tried by any other court or commission for a military offence of which a general court martial has jurisdiction.

Much has been done to improve our system of military justice, and much still remains to be done for its improvement. Like the other staff departments, it now has its chief of department, the Judge-Advocate-General, with a Bureau of Military Justice at the seat of government. At this Bureau the records of all military courts are preserved, and here they undergo an examination as to their correctness. Here are made decisions on points of military law for the whole army, an excellent digest of which has been lately printed, which has much increased the uniformity of practice in our service. For every army in the field a judge advocate is appointed, with the rank and pay of a major of cavalry, whose duty it is to attend to the correct administration of justice in the army to which he belongs, under the direction of the Judge-Advocate-General. These judge advocates, as a rule, act as judge advocates of courts only in cases of importance. Their chief duty is to revise the proceedings of military courts, and see that they are correct, to make reports upon them for the convenience of the commanding general, and to determine questions of law arising in the army which may be referred to them for their opinion. In one army there may frequently be a dozen or more military courts in session, each with a special judge advocate temporarily appointed to it from the line. It is the duty of the judge advocate of the army to see that these courts are conducted upon correct principles, and that their proceedings are legal and legally executed.

A general commanding a department, an army, a corps, a division, or a separate brigade, may convene a general court martial. These courts consist of not more than thirteen nor less than five members, and cannot act when reduced below the latter number. No president is appointed by name, but the senior officer present is president *ex officio*. He has the

same vote as the other members, and is simply the mouthpiece of the court, and acts as its moderator. The accused has the right of challenge for cause against every member of the court, upon which challenge the court decides, the challenged member retiring. The accused has a right to counsel, and may make any plea allowed by the common law; but military law does not require in the indictment or other pleadings the same precision of statement that is required in our courts of common law. It is sufficient if the offence be alleged substantially. The charge is usually a general allegation that some article of war has been violated; the specification describes the offence more particularly, giving time, place, and other details.

Procedure by a general court martial, where every question and answer is reduced to writing, is necessarily much slower than that at common law. Where questions requiring the decision of the court are raised, it is also necessary to clear the room of prisoners, counsel, spectators, &c., — a process which in practice consumes a great deal of time. The employment of phonographic reporters has much facilitated the business of the court. In old times, when trials were few and time plenty, and to be placed upon a general court martial at an agreeable post was at least a two months' vacation, courts martial might well be dilatory. The usual process was to write out carefully each question before putting it, then to paste it to the record, then to ask the witness if he was ready for it, and finally to propound it. The question (if unobjected to) the witness proceeded to answer at the rate at which a judge advocate could reduce his words to writing. The answer was then read aloud, corrected, read as corrected, and finally thus recorded. The questions of the accused were all to be written out by him, and submitted to the judge advocate, then, if not objected to, they were propounded by the judge advocate to the witness with the same formalities. Phonography ha cured these delays, and the unreasonable practice of not allowing the accused or his counsel to ask questions *vivâ voce* and directly of the witness, without the mediation of the judge advocate, is becoming obsolete.

The theory of military courts in regard to counsel has been,

that they were merely advisers of the accused, permitted to attend him, but not to argue his case or address the court in person. The questions of the accused were theoretically prepared, not by the counsel, but by the accused acting under his advice; the closing argument for the defence was simply a statement made by the prisoner, and read by the counsel for the sake of convenience. Practice has shown the injustice of these restraints, and counsel who show proper respect to the court are generally granted the privileges of counsel in our civil courts.

The duties of the judge advocate are difficult and complex. He is, — 1st. The prosecuting officer of the government; 2d. The legal adviser of the court; 3d. The recorder of the proceedings; 4th. He is "so far counsel for the prisoner, after the prisoner has made his plea, as to object to any leading questions to any of the witnesses, or any question to prisoner the answer to which might tend to criminate himself." *

By remarking the number of persons it takes at the common law to perform these various functions, the weight of the duties of the judge advocate may be estimated. He is at once judge, district attorney, and reporter, not counting the duties he owes the prisoner, so that he is at least, as Mrs. Malaprop remarked of Cerberus, "three gentlemen in one," if not four. Moreover, his duties to the prisoner, when not defended by counsel, are often increased, both through the dictates of common humanity and by the custom of the service, beyond the requirements of the 69th Article of War. He is often obliged to explain to the court the prisoner's theory of defence, to frame in proper language his questions to witnesses, and in other respects to present his cause intelligibly. This, of course, is difficult. The judge advocate cannot throw himself on the prisoner's side, nor can he abandon for the moment the theory of the prosecution, so that he is at best but an imperfect agent for the offices of justice.

But the chief difficulty in the judge advocate's position rests in the incompatibility of his first two duties. It is clear from an examination of the composition of the general court martial, that there is no judge, properly so called; that is to say,

* 69th Article of War.

there is no distinct officer invested with the authority held by a judge at common law, whose duty it is to lay down the law in the trial, to decide upon questions of the admission of evidence, to instruct those whose province it is to weigh the facts as to the correct application of the law to the evidence, and in general to protect the rights of the accused and to preserve a strict administration of justice. There is no officer in whose long experience in the practice of military law the members of the court can trust, and in whose entire impartiality in the case in hearing the court, prosecution, and prisoner can alike repose implicit confidence. The judge advocate, to be sure, is constituted the legal adviser of the court; but there is no rule compelling the court to ask his advice, or, if he gives it, to take it. Besides, he is the prosecuting officer. He cannot, try as much as he may, be entirely impartial. He is the advocate whose duty it is to produce evidence against the prisoner, and to use all fair means to secure his conviction. Is it not expecting too much of human nature to oblige this man to give impartial advice on points arising in this very evidence, — to compel him, as it were, to be a judge in his own case? In the preparation of a cause, his mind, from a consideration of the facts as he acquires them from the witnesses for the prosecution, has come to look upon the case in a certain light. It is led, in a large majority of cases, to a conviction of the prisoner's guilt; and such a conclusion is not only natural, but entirely justifiable, and even unavoidable. The judge advocate has, moreover, the natural and proper desire to introduce this evidence forcibly, and to sustain and corroborate his witnesses, — in short, to win the case. On the trial, however, whether from the cross-examination of the witnesses for the prosecution or the testimony of those for the defence, new phases of the case may arise, and the court require the advice of the judge advocate on some point of law. Is it probable that, with his mind predisposed to his own theory of the case, he can give fair and unprejudiced advice, even with the fairest intentions and the most magnanimous disposition towards the accused? Or suppose a question of evidence to arise, upon the admission of which there is elaborate and animated argument between the prosecution and defence, at the conclusion of which the court

require the judge advocate to advise them as to its admissibility. They then ask the very man who has just used all the powers of his mind to prove one side, to consider both sides impartially, and to give an unprejudiced opinion. They desire to metamorphose in the twinkling of an eye the advocate into the judge. Yet they are acting strictly in accordance with the law; and supposing the members of the court to be all of them (as it frequently happens) entirely unskilled in the law, this is their only course to discover it. In such a case the judge advocate must either decide that he was right, or else stultify himself, and declare that he was merely arguing as an advocate a point which his sober reason declares to be against him. Now it is a common experience at the bar that a counsel may frequently offer evidence, which, when presenting, he believes to be admissible, but, after argument on both sides, he is inclined to believe should properly be excluded; or a counsel may often consider it his duty to offer evidence as to the competency of which he is desirous that the court should decide. Place the judge advocate in either of these positions. In the first, he is either compelled, when called upon by the court for his opinion, if an honest man, to retract his argument, or if dishonest, to give an opinion contrary to his better judgment. In the second, as he must come to some conclusion, he will generally take his own side, though his doubts are by no means removed. Grant that a judge advocate is an honest man, and anxious to do his duty both to the government and to the prisoner, it is beyond human nature for him to succeed in it. If he is dishonest, or even indifferently honest, justice must sadly fail. Suppose him to be over conscientious, and over sensitive to the difficulties of his position and his liability to prejudice on the side of the prosecution, these qualities may lead him to lean too much to the prisoner, and thus again the cause of justice must fail. In short, it is impossible to be prosecuting officer and judge at once.

Besides the innate difficulty resting in the judgment of the judge advocate, his opinions cannot command that respect and win that authority which should attend those of a judge. Even though in themselves the most sound, correct, and impartial, their source impugns them. The court cannot but see that it

is the advocate that gives them. The prisoner discovers in them the views of the man who has been heaping up testimony to convict him. The public at large distrust them for both these reasons. Thus the position of a judge advocate, especially in cases of importance, with able and experienced counsel for the defence, where it requires all the powers of his mind to maintain the equality of the prosecution, is not only rendered trying to himself, but makes him an object of suspicion to the public. He frequently receives hostile criticism for unfairness, when his conscience entirely acquits him, or reproaches him with having pressed with too little vigor the rights of the government, from a fear lest he might wrong the prisoner. In a small case, involving an ordinary military offence of every-day occurrence, in which nice points of evidence rarely arise, and where the members of the court are competent to decide, without calling for advice, the ordinary questions arising, and where there is rarely counsel, or, if any, a brother-officer not very learned in the law, — in such a case the judge advocate will easily succeed in performing his multifold duties with justice and discretion. In these the contradictions of his office, though in principle still contrary to reason, do not avail to injure the cause of justice. But it is in the long and complicated trials, of which the past four years have seen so many, for fraud or embezzlement, to be proved only by a long array of circumstantial evidence, or for wide-spread conspiracies, — in trials lasting for weeks and months, where the accused are defended by eloquent and experienced advocates, ready to use every means to secure the acquittal of their clients, and whose "sacred duty" it is, in the language of the greatest living lawyer of England, "to know in the discharge of that office but one person in the world, that client and no other, to save that client by all expedient means, to protect that client at all hazards and costs to all others, and, among others, himself," — it is then that the manifest impracticabilities and contradictions of the office are seen to their fullest extent.

The proper remedy for this evil would seem to be in the severance of the duties of the judge advocate, whereby they should be reduced to those of a prosecuting officer, and in the constitution of a new office of judge of military courts, whose duties

should be assimilated to those of judges at common law. The Rebels abolished general courts martial except for the trial of officers above the grade of colonel, and substituted military courts, composed of three military judges with the rank of colonel, to retain office during the war.* While this change doubtless gave greater experience on the part of the judges and greater consistency to their decisions, it did not possess that valuable element in which a court martial has so strong a resemblance to the common law, — that it gives a trial by military peers impanelled to try each case, and on that account the more impartial. It is conceived that the constitution of the office of military judge, to preside over the court martial, define the law, rule upon the evidence, and instruct the members of the court upon the correct application of the law to the facts, would secure a fairer administration of justice than any other change in the system. Such an officer, in common with the judge advocate, would require both a legal and military education, and sound experience in both departments; for the mere lawyer would fail to appreciate the standard of discipline and the modes of life and thought peculiar to the army, while the mere soldier without legal instruction and experience would make but poor work with the law. The plan we propose would give stability and consistency to the decisions of all the military courts throughout the army, and secure respect for their impartiality. The rulings would of course be recorded in each case, so that error could be easily corrected at the Bureau of Military Justice, (which is now the high court of appeal,) by granting a new trial, or making such other order as the nature of the case should require.

Omitting this striking defect, a general court martial is probably as fair a tribunal as exists under any system of law. It is composed of gentlemen of high rank in the army, usually selected by the convening authority for their good sense and judgment. Their notions of honor are high, their anxiety to preserve the integrity and discipline of the service to which they belong is strong. Habit has made them conversant with the class of cases which they investigate, and with the trains of

* Digest of the Military and Naval Laws of the Confederate States, (Columbia, 1864,) p. 117.

thought inducing those arraigned before them to stray from the path of duty. They are not anxious to convict the accused of crime, for each conviction is a stain upon an honorable profession. Jealous of its reputation, they are slow to believe its members guilty of crime and to publish it to the world. When, however, their minds are convinced, the same feelings lead them to punish the offenders with fitting severity. To guerillas, blockade-runners, spies, assassins, and other enemies by fraud and stealth, they are doubtless as fair and as little severe as any jury of truly loyal men that could be impanelled.

The final deliberations of a court martial take place with closed doors. The judge advocate then acts only as recording officer, and has no right to press his case or offer his opinion. He puts the question as to the guilt of the prisoner upon each specification and charge in turn, the junior member voting first. A majority is sufficient for conviction, except in capital cases, where a two-thirds vote is required. The record, being completed, is signed by the president and judge advocate, and transmitted to the officer convening the court. The court and judge advocate are bound by oath not to reveal the sentence until it is officially promulgated in General Orders, and not to disclose the individual votes or opinions of the members unless called upon as witnesses in a court of justice. The officer to whom the record is transmitted may entirely disapprove the proceedings, which annuls them entirely. If this officer approves them, he may, if commanding a force less than an army or department, execute sentences less severe than those of death or the dismissal of a commissioned officer. The latter sentences he must forward to his superior. A general commanding an army or department may in time of war carry out sentences dismissing or cashiering (which are now equivalent terms) a commissioned officer, and may order the execution of prisoners convicted of desertion, mutiny, murder, guerilla-marauding, or as spies. Sentences of death for other offences, and relating to general officers, must be acted on by the President. The infliction of the death penalty is thus placed under proper guards, while at the same time the army commander can, in the most frequent offences, add the great element of promptness to the example afforded by their punish-

ment. It is obvious that, had there been less clemency shown to deserters at the beginning of the war, the result would have been fewer executions in the end, fewer desertions, and less loss of life. Desertion is the commonest crime in an army, and the most destructive to it, and consequently the most heinous and to be the most severely punished. It was a vast agent in the destruction of the Rebel force. During the winter of 1864 and 1865 the number of desertions to our lines, before Richmond and Petersburg alone, was about one hundred a night. Taking two hundred for the average number in a Rebel regiment, (a liberal allowance at that time,) this rate of desertion, reckoning five regiments to a brigade, gives an aggregate of three brigades a month. And, knowing, as we do, that the desertion to their homes far exceeded that to our lines, the effect of such depletion of the Rebel army can well be imagined.

The President is held to possess the power of dismissing with disgrace any officer without trial of any sort whatsoever. This power has lately been distinctly confirmed by Congress, and a recent attempt to repeal the confirmation was defeated. The chief arguments in its favor are, first, that what the President has the right to confer, he has the right to take away; and secondly, that in cases where a trial cannot conveniently be had, and guilt is clear, it is a useful and exemplary method of punishing crime. Were no disgrace attendant upon the dismission, the first reason might have more force; and for the second it may be questioned whether, without hearing both sides of the question, any matter can ever be so clear as to justify the blasting of a reputation for life. This power has been very unpopular in the army. It is contrary to the whole system of military law, which entitles an officer to trial by his peers. It is open to vast abuses; and, in practice, the large number of revocations of these summary dismissals which appear on the pages of the orders of the War Department show how many errors, even under the just administration of an honest President and Secretary, may be committed under a system which can permit but one side to be heard, and compels decision on *ex parte* testimony. An officer so dismissed has been lately granted the right of an appeal to trial by general court martial, which, if not granted within six months, restores him *ipso facto* to his

former position. But, even with this modification, the evil principle of the system remains the same, and even a restoration of his rights may not serve to recompense an officer for the pain and ignominy of previous unjust degradation.

The spirit of progressive improvement in the various departments of military science which has so marked this war has not been unfelt in the department of military justice. Many improvements have been made, and more, we believe, still remain to be made, the result of the practical experience of military men in this most important branch of war.

Art. III. — Character.

Morals respects what men call goodness, that which all men agree to honor as justice, truth-speaking, good-will, and good works. Morals respects the source or motive of this action. It is the science of substances, not of shows. It is the *what*, and not the *how*. It is that which all men profess to regard, and by their real respect for which recommend themselves to each other.

There is this eternal advantage to morals, that, in the question between truth and goodness, the moral cause of the world lies behind all else in the mind. It was for good, it is to good, that all works. Surely it is not to prove or show the truth of things, — that sounds a little cold and scholastic, — no, it is for benefit, that all subsists. As we say in our modern politics, catching at last the language of morals, that the object of the state is the greatest good of the greatest number, — so, the reason we must give for the existence of the world is, that it is for the benefit of all being.

Morals implies freedom and will. The will constitutes the man. He has his life in Nature, like a beast: but choice is born in him; here is he that chooses; here is the Declaration of Independence, the July Fourth of zoölogy and astronomy. He chooses, — as the rest of the creation does not. But will, pure and perceiving, is not wilfulness. When a man, through